THE SUTTON LAW FIRM

January 23, 2006

Ms. Stacey Fulhorst
San Diego Ethics Commission
1010 Second Ave., #1530
San Diego, CA 92101

RE: Documents Relating to Lobbyist Registration Thresholds

Dear Stacey:

As promised, enclosed are documents referenced in my comments at the Ethics Commission hearing earlier this month regarding various issues surrounding lobbyist registration thresholds.

1. The enclosed FPPC advice letter confirms that the state's contingency fee lobbying ban does not apply to state agency contracts. (FPPC Advice Letter to Lou Cordia (11/3/99) No. A-99-235.)

2. The only local jurisdictions of which we are aware which impose a contingency fee lobbying ban are the County of Los Angeles and the Los Angeles Metropolitan Transit Authority (though we did not survey all local lobbying rules), although we understand that the County and/or LAMTA exempt "sales commissions" on public contracts from this ban. (L.A. County Code section 2.160.130; LAMTA Admin. Code section 5-25-140; copies enclosed.)

3. State law includes a "regular and substantial" standard in its definition of "lobbying firm" (Cal. Govt. Code section 82038.5(a)(2); copy enclosed), and puts the $2,000/$5,000 compensation tests for this lobbying firms in the applicable FPPC regulation. Although the definition of "lobbyist" used to include the "regular and substantial" standard, Prop. 34 replaced this language with the $2,000 compensation test for contract lobbyists and a "principal duties" standard for in-house employees (section 82039 ; copy enclosed), with the 33 percent time standard found in the applicable FPPC regulation.

4. The enclosed FPPC memorandum provided guidance on how to count "contacts" with state officials under the prior qualification test; the San Francisco Ethics Commission uses this memorandum under its contacts test.

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Feel free to call with any questions regarding these issues.

Sincerely,

James R. Sutton

Enclosures
JRS/lc
#1193.01

Memorandum of the California Fair Political Practices Commission

To: Interested Persons
Re: Qualification as a Lobbyist Under Regulation 18239

The tests for determining when a person must register as a lobbyist are contained in FPPC Regulation 2 Cal. Code of Regulations Section 18239. In order to facilitate application of these tests, the FPPC staff has prepared a list of common situations in which the contacts test should be applied. In each situation, we have listed how many contacts should be counted for purposes of applying Section 18239(c). In applying the contacts test, you should keep in mind that all contacts for all clients or employers are added together; a person does not need 25 contacts for one employer or client to qualify as a lobbyist. Once qualified, the lobbyist must register and report activities for all clients and lobbyist employers, whether or not the lobbyist has 25 contacts for each individual client or employer.

If you have questions about the number of contacts in other situations or have any other questions about the application of Section 18239, you should call the Commission's Technical Assistance Division at 916/322-5662.

Application of Regulation 18239(c)

(1) The person meets with or talks to one legislator (or the legislator's aide):
- (a) once, to discuss several bills for several clients -- 1 contact
- (b) twice, in the same day, on the same bills for the same client(s) -- 1 contact
- (c) starting in the morning, and continuing the meeting after lunch, on several bills for the same client(s) -- 1 contact
- (d) starting on one day, and continuing the meeting on the next day with the same participants and issues -- 1 contact
- (e) twice in one day, each time on a different bill or issue for a different client -- 2 contacts

(2) The person meets with:
- (a) a legislator and the legislator's aide -- 1 contact
- (b) two legislators -- 2 contacts
- (c) a legislator and another legislator's aide -- 2 contacts
- (d) a legislator's aide -- 1 contact
- (e) two aides to the same legislator -- 1 contact
- (f) aides to two different legislators -- 2 contacts

(3) The person testifies at a legislative hearing at which several legislators are present:
- (a) on one subject for one client -- 1 contact
- (b) on several subjects for one client -- 1 contact
- (c) on one bill or subject for several clients -- 1 contact
- (d) in the morning on one subject for one client, in the afternoon before the same committee on a separately scheduled, different subject for another client -- 2 contacts

(e) on one subject for one client one day, and continues testimony for the same client on the same subject when the hearing continues to the next day -- 1 contact

(4) A company officer or employee meets with a legislator (or the legislator's aide):
(a) along with the company's paid, registered lobbyist -- no contact for the officer or employee
(b) the meeting is arranged by the company's registered lobbyist; the lobbyist does not attend -- 1 contact for the company officer or employee

(5) The person attends a "planned collective gathering" which is primarily a social or political occasion, such as a cocktail party, a reception, a fund-raiser, or similar event, at which several legislators or aides are present and there is some discussion of legislation with the legislators or aides -- 1 contact

(6) The person has lunch with two legislators (or their aides) and legislation is discussed -- 2 contacts

(7) The person sends:

(a) identical or almost identical copies of a single letter to many legislators -- 1 contact
(b) several different letters on the same issue to a number of legislators -- 1 contact for each different letter

(8) The person appears and testifies at a public meeting of a board or commission or agency (not administrative testimony) -- 1 contact

(9) The person meets (not at a public meeting) with:
(a) two members of a commission -- 2 contacts
(b) the executive director (or chief executive officer), general counsel, and one board member of an agency -- 3 contacts
(c) two board members and two agency staff members -- 2 contacts
(d) the executive director and an agency attorney (not the general counsel) or staff member -- 1 contact
(e) three agency staff members -- 1 contact

THE SUTTON LAW FIRM

January 20, 2006

Ms. Dorothy Leonard
Chair, San Diego Ethics Commission
1010 Second Ave., Ste. 1530
San Diego, CA 92101

RE: Lobbyist Registration Thresholds

Dear Commissioner Leonard:

The San Diego Public Affairs Working Group ("Working Group") was pleased to have the opportunity to provide comments to the Ethics Commission last week regarding changes to the registration thresholds for City lobbyists, as part of the Commission's comprehensive review of the City' lobbying law. As mentioned, the Working Group is an informal coalition of public affairs firms, trade associations and businesses which are involved in the City governmental process which was organized to provide input to the Commission and the City Council on the proposed changes to the lobbying law. The over-riding goal of the Working Group is increased public disclosure of governmental advocacy activities through fair and balanced reform, consistent with the Constitutional protection on "petitioning the government for the redress of grievances." (A current list of Working Group members is enclosed.)

Our law firm specializes in lobbying, ethics and political law, and has worked with cities and counties throughout the state as they have revised their lobbying laws. As mentioned at last week's meeting, we applaud the efforts of your staff to take a comprehensive look at the City's lobbying law, especially the detailed chart which staff prepared comparing various lobbying laws on the state and local level.

The Working Group has six specific comments regarding the registration threshold:

1. Contacts test for businesses and organizations. We agree with staff that determining whether a business or nonprofit organization has to file lobbyist reports should be based on the number of "contacts" which the entity's employees have with City officials, rather than how much an employee earns for these activities. Most notably, basing registration on a person's salary means that a highly compensated individual, such as the executive director of a trade association or the CEO of a company, may have to register

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based on a limited amount of lobbying activities, whereas a lower-paid staff person who undertakes a significant amount of lobbying activities may not have to register.

2. Contacts and compensation test for contract lobbyists. A slightly different analysis applies to determining whether a public affairs or law firm should file lobbyist reports. Because the services which a public affairs or law firm provides to a client may actually be done by several different employees of the firm, we believe that contract lobbyists be required to register for a client if the firm is paid a threshold amount by that client or if the firm's employees have a significant number of contacts with City officials on behalf of the client. (San Francisco follows this "bifurcated" system for registration of contract lobbyists v. businesses and organizations which lobby. (S.F. Camp. & Govt. Conduct Code section 2.105(I)(1) & (2).))

3. Registration by firm or organization, not individuals. Most jurisdictions have registration done in the name of the lobbying firm or business or organization which lobbies, not in the name of the individual employees at the firm or organization, with the forms then listing the names of the individuals at the firm or organization who actually contact City officials. We recommend this approach for the City of San Diego, both to make it easier for the public to access information regarding the lobbying activities of firms and organizations, and to keep multiple individuals at the same firm or organization from having to file duplicative reports.

4. Registration for volunteer representatives of organizations. Although we generally agree that the City should not require individuals who are advocating on behalf of an organization on an unpaid basis to register, we believe that registration is appropriate if the organization itself is not registered. For example, if a trade association or advocacy group is registered, then the public is aware that this entity is attempting to influence City actions when one or more of the entity's board members or other volunteers meet with City officials. As mentioned by another speaker last week, these lobbying activities of an entity's board member or other volunteers can be significant – but if the organization is not registered, the public would not be aware of any of these activities. (San Jose has a similar provision in its lobbying law. (S.J. Muni. Code section 12.12.030(D).))

5. Registration based on "contingency fee agreements". We agree with staff that firms which are paid a "contingency fee" or "win bonus" should they be successful in convincing the City to grant their client a contract or other item should have to register. (As discussed briefly at the hearing, lobbyists who are retained to help a client obtain a City contract are often compensated by receiving a fee based on a percentage of the contract

amount; in these arrangements, the lobbyist is in essence acting like a "salesperson" being paid a commission, with the City simply being another customer purchasing the client's goods or services.) If this potential payment meets whatever threshold the City adopts, the firm should have to register.

6. Client authorization. Finally, we recommend that contract lobbyists be required to submit some type of letter or form, signed by a client, indicating that the client has authorized the lobbyist to contact City officials on its behalf. All other jurisdictions require some form of client authorization, so that City officials have some sort of public record confirming that they can talk to the lobbyist about the client's issue.

Again, we look forward to working with staff and Commissioners throughout this process. If you have any questions regarding the recommendations outlined in this letter, please do not hesitate to contact us.

Sincerely,

James R. Sutton /lc

James R. Sutton

Enclosure
JRS/lc
#1193.01

Submitted by Simon Majeski at 1/12/06 Ethics meeting

Who should register as a lobbyist?

The Executive Director has certainly presented a deep and thoughtful analysis of the issues and for this we are most appreciative. Her report clearly illustrates the complexity of the issue. We find the recommendation by Bob Ottilie, suggesting the banning of "behind-the-scenes" lobbying activities particularly intriguing.

Events at the local and national level have focused a growing awareness that the undue influence of some lobbyists on government calls for increased scrutiny and regulation. All of us who are not "Lance Malone" recognize that to the extent possible it would have been a better thing if he had been registered as a lobbyist and his dealings with elected officials illuminated. Behaviors and attitudes that have prevailed in the past, such as the opinion that less regulation and scrutiny is better, need to be replaced. Reason dictates that since not all practitioners of the persuasive arts always do "the right thing", rules leading to greatly improved transparency are now necessary.

Complicated rules, such as those currently held by many California governments, are not necessarily the best. We think the rules for lobbyist registration should be as simple as possible while still achieving the desired result of transparency, but no simpler.

"When in doubt, disclose" is a good rule.

Some recommendations and clarifications:

- Setting the threshold "dollars paid to lobbyists" for lobbying activity as is currently done in San Diego (anyone who earns more than $2542 for lobbying in a calendar quarter must register with the City Clerk's office) invites forgetfulness, requires undue tracking and reporting and bypasses those who are not paid directly for lobbying. We would suggest replacing this complex rule with a more simple $1 threshold: **the first time one contacts a city official with the purpose of influencing that official to do or not do something, outside of a public meeting or hearing, and that person is paid any amount to do so, that person is required to register with the City Clerk's office as a lobbyist.** This should include telephone calls, office meetings, and conversations on the street or in the home, at the bar or outside a church - anywhere when the conversation turns to the purpose of influencing a city official. (This might be a good enough reason to adopt Ottilie's recommendation.)

- If one is classified as an in-house lobbyist, that person should register if he or she has a specified number of official contacts. We suggest that a **single** contact makes a lot of sense as a "specified number", even though the number of people required to register would certainly increase dramatically. The decision here boils down to the potential burden of over-reporting by infrequent lobbyists versus the potential for big-money lobbyists to avoid disclosure. We believe this potential is a serious one; our recent problems in this regard have come at a tremendous cost,

monetary and otherwise. Hopefully, forthcoming automation of many aspects of registration will tip the balance in favor of more reporting.

- We do not wish to register ordinary citizens speaking to city officials, or members of organizations who make a phone call to an elected official in support of an action. This would stifle public participation and would be an onerous record-keeping requirement for the city clerk. But a **representative of an organization that organized a phone banking effort for that action** may be someone who should register. An example might be a faith-based organization interested in seeking a very favorable price to lease a piece of public land for a nonprofit detoxification facility that would represent a significant taxpayer subsidy. The pastor meets with councilmembers at their offices to discuss the proposal, and also attends public comment hearings to promote the proposal. His ministry organizes a phone banking and letter-writing campaign to urge councilmembers and the mayor to support the proposal. The pastor and/or his organization should have to register (for a nominal fee in deference to their nonprofit status) so that the public can understand that while the organization does not primarily deal in lobbying elected officials to influence public policy, they are seeking a policy change on a one-time basis that will have significant fiduciary impact.

  The difficulty would be to describe the concept of "significance" to the public. It may be a dollar amount -- say, anybody seeking to influence policy in an organized way to make a change costing the public over $50,000. Then it would be necessary to define the terms "in an organized way" and what the dollar amount should be.

  We again would be against making members of that pastor's church register because they made a call or wrote a letter to anyone in city hall in support of the pastor's proposal.

- An expenditure threshold could work right along with a dollar threshold. We recognize the potential for an independently wealthy person who needs no "income" but who can spend his or her own money to get others to contact elected officials to have very strong "voice" in determining legislation from which he or she can benefit or cause others to benefit. This person should also be required to register as another way to protect the public interest.

- **Distinctions between the kinds of lobbying and lobbyists above should be made with regards to the fees they must pay**, both an annual registration fee and a per-client registration fee. Such distinctions should be discussed when the fee structure is considered by the Commission.

- Our goal is to make sure that the financial relationships between policy makers and those trying to influence them are disclosed (including gifts and contributions) and that the public know how much money is being spent to influence governmental decisions. To that end we want to make sure that

whoever is administering and enforcing this law is required to provide quarterly summary reports that are available on the City's website or something similar; we know this will be discussed in the next few months but thought it important to mention it here.

Respectfully,
Simon Mayeski
Alberto "Tito" Zevalles
California Common Cause

From: "Eigner, William W." <wwe@procopio.com>
To: "Katherine Hunt" <KHunt@sandiego.gov>
Date: 11/7/2005 11:22:53 AM
Subject: RE: Proposed Changes to City of San Diego Lobbying Ordinance

Ms. Hunt,

Speaking for myself only, and not for my firm or any client, I suggest that any ordinance amendments take into account the special sensitivities of lobbying on quasi-judicial matters, which are described in the attached article. Thank you.

Bill Eigner

William W. Eigner
530 B Street, Suite 2100
San Diego, CA 92101
619-515-3210 Direct
619-744-5410 Fax
wwe@procopio.com E-Mail

-----Original Message-----
From: Katherine Hunt [mailto:KHunt@sandiego.gov]
Sent: Monday, November 07, 2005 10:50 AM
To: Katherine Hunt
Subject: Proposed Changes to City of San Diego Lobbying Ordinance

The Ethics Commission will consider proposed amendments to the City of San Diego Lobbying Ordinance at a public hearing scheduled on Thursday, November 10, 2005, at 5:00 p.m. in the Council Committee room located on the 12th Floor in the City Administration Building at 202 C Street. Please plan to attend if you are interested in the proposed changes and would like to address the Commission with comments or suggestions regarding this matter.

Thank you.

Ethics Commission

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Lobbying Guidelines and Rules for Ex Parte Contact

By William W. Eigner* and Robert L. Wernli, Jr.**

William W. Eigner

Robert L. Wernli, Jr.

I. INTRODUCTION

Many developers, architects, government officials, and members of citizen groups are uninformed in their attempts to influence government land use decisions.[1] Because improper advocacy can have severe consequences, we will attempt to clarify the restrictions in this area to help advocates navigate the thicket of seemingly conflicting rules and avoid penalties or accusations of impropriety. In particular, we will try to shed some light on the somewhat vague rules of ex parte (or private, nonpublic) advocacy in land use decisions, examine the undesirable consequences of breaking the rules of ex parte advocacy and discuss how an advocate may lobby for his client without infringing on those rules.

II. QUASI-JUDICIAL DEFINED

An advocate's limitations on conducting ex parte communications regarding a land use matter with a deciding member of a local governing board will depend on whether the matter is legislative or quasi-judicial in nature. While there is virtually "no limitation" on one's ability to conduct ex parte discussions with council members regarding purely legislative matters, one must tread carefully in the quasi-judicial area.[2]

A quasi-judicial matter is one that is essentially judicial regardless of the status of the entity deciding the matter. Therefore, a city council, though thought of as a legislative body, may assume a quasi-judicial role when it considers an appeal of a planning commission's land use decision. For example, the rule for ex parte advocacy within the City of San Diego, adopted by current San Diego City Attorney Casey Gwinn, is:

> Private contacts, oral or written, between anyone and a member of the City Council, a council committee, or any city board or commission are inappropriate with respect to any quasi-judicial matter to be considered by the council, committee, board or commission.[3]

Indeed, City Attorney Gwinn asks council members "to disclose all of their communications to the rest of the body and to produce any written materials that they received during any [ex parte] meeting they attended."[4] The distinction between legislative and quasi-judicial is elusive. Ordinarily, an action is quasi-judicial when it involves a specific piece of private property, while an action is legislative when it affects a broad spectrum of interests.[5] When an

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action affects more than one property, however, it is difficult for a court to determine whether the action affects enough parties to make the matter legislative instead of quasi-judicial.

One court determined that an action concerning a permit application by the California Coastal Zone Conservation Commission was quasi-judicial in nature because:

1. the commission is obligated to hold a public de novo hearing;
2. the commission must consider the evidence brought forward;
3. the commission must use its discretion to allow or disallow the requested permit; and
4. the commission must record the grounds upon which the judgment rests.[6]

Therefore, when a panel is obligated to weigh information presented in a public hearing and must record the grounds for its decision, the matter is probably quasi-judicial if it concerns a specific site.

Further examples of quasi-judicial proceedings include a city council's or city commission's consideration of granting any of the following:

1. conditional use permit;[7]
2. use permit;[8]
3. variance;[9]
4. planned unit development permit;[10]
5. building permit;[11]
6. proposed parking district;[12]
7. appeal of a governmental commission's decision.[13]

III. ZONING

Zoning is particularly slippery in the quasi-judicial/legislative analysis.[14] According to case law, "it is long settled law that zoning is a purely legislative act."[15] However, when site-specific zoning action is contemplated, the matter may be quasi-judicial.

Generally, zoning measures that affect a wide area are not considered quasi-judicial even if they have a severe impact on individual property interests. For example, the California Supreme Court upheld San Diego's Proposition D uniform height limitation for buildings erected in the coastal zone even though notice and a hearing were not afforded to affected property owners. In so doing, the court stated that the height limitation ordinance was "unquestionably a general legislative act," and that procedural due process limitations did not apply.[16]

Other examples of legislative or administrative matters include appropriations, budgetary decisions, taxing ordinances, and resolutions relating to contracts, leases, and appointments.

IV. DUE PROCESS REQUIRED FOR QUASI-JUDICIAL PROCEEDINGS

Quasi-judicial proceedings require local governing boards to afford an aggrieved party procedural due process and, accordingly, an advocate lobbying for his client before the local governing board in connection with a quasi-judicial proceeding is restricted in communicating ex parte with such local governing board regarding such proceeding. The Due Process Clause of the Fourteenth Amendment of the United States Constitution requires "at a minimum...that deprivation of life, liberty or property *by adjudication* be preceded by notice and opportunity for hearing."[17] Moreover, "it is settled constitutional doctrine that due process requires 'notice and hearing' only in quasi-judicial or adjudicatory settings and not in the adoption of general legislation."[18] Ex parte communication with those conducting a quasi-judicial hearing may violate the Fourteenth Amendment because the aggrieved party may not have the opportunity to counter an opponent's behind-the-scenes arguments. Municipal codes will often address these due process concerns. For instance, the San Diego Municipal Code specifies that certain permit actions may be taken only after public hearings, and only after the panel has reviewed the evidence presented at the hearing.

If judicial review of an administrative action is requested by a participant after a governing panel has stated its findings, in the court's review of such find-

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ings, the rules of *U.S. v. Morgan*[19] "preclude inquiry outside the administrative record to determine what evidence was considered, and reasoning employed by the administrators." The court's review is limited to the matters of record so that the administrators will be able to decide issues dispassionately without being subjected to undue harassment.[20] Nonetheless, because the courts limit their review to matters of record, many courts have held that ex parte communications received by panel members violate the due process rights of the participating parties because they do not appear in the record. An example of an ex parte communication violating a party's due process rights is found in *English v. City of Long Beach*.[21] In *English*, members of the city's civil service board upheld English's termination from the police department because he had failed to pass the mandatory physical examination. Members of the board, in reaching that decision, relied upon evidence taken outside the hearing and outside the presence of English or his attorney. For instance, board members spoke ex parte with an examining doctor and even English's personal physician.

In deciding to issue a writ of mandate annulling the board's order, the court held:

> [A]dministrative tribunals which are required to make a determination after a hearing cannot act upon their own information, and nothing can be considered as evidence that was not introduced at a hearing which the parties had notice or at which they were present.... A contrary conclusion would be tantamount to requiring a hearing in form but not in substance, for the right of a hearing before an administrative tribunal would be meaningless if the tribunal were permitted to base its determination upon information received without the knowledge of the parties. A hearing requires that the party be apprised of the evidence against him so that he may have an opportunity to refute, test and explain it, and the requirement of a hearing necessarily contemplate a decision in light of the evidence there introduced.[22]

Similarly, in *Safeway Stores, Inc. V. City of Burlingame*,[23] the court held that the opponents of a proposed parking district did not receive a fair hearing. The unfairness resulted because the members of the city council had conferred with affected property owners outside the council hearing and had taken private fact-finding trips to the site.

Seemingly at odds with the English line of cases is *City of Fairfield v. Superior Court of Solano County*.[24] The *Fairfield* court, in deciding a petition to set aside the city council's denial of a planned-unit development permit, held it was improper for proponents to depose two council members regarding their pre-hearing public statements in opposition to the project. The court determined, even if the proponents could prove that the officials had made public statements opposing the project, that fact would not violate due process.[25] The *Fairfield* court went on to state that the proposed project was "of concern to the civic-minded people of the community, who will naturally exchange views and opinions concerning the desirability of the [project] with each other and with their elected representatives."[26] Moreover, "[a] councilman has not only a right but an obligation to discuss issues of vital concern with his constituents and to state his views on matters of public importance."[27]

Fairfield illustrates the strong trend in the law to protect public officials from intimidation and the siege of persistent second-guessing by dissatisfied appellants. Similarly a court has refused to compel school board members to answer deposition questions posed to discover the reasons for their refusal to renew a teacher's contract. Although the proponent of the questions claimed that "he was seeking not to probe mental processes but rather to determine whether procedural requirements were met," the court refused to accept the proposed distinction and held that the questions "impermissibly tended to compromise the administrative process."[28]

In sum, though due process is required for quasi-judicial matters, no clear standard exists to guide courts in determining what to do when ex parte evidenced is presented to city council members. The dichotomy between affording the aggrieved party a chance to combat prejudicial ex parte evidence and the concern for protecting decision-makers from

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intimidation and second-guessing makes the court's job particularly difficult.

V. RISKS OF VIOLATING DUE PROCESS RIGHTS

The risks of violating a party's due process rights by communicating with a council member ex parte are potentially severe. Nonetheless, ex parte communications are not illegal and would not result in any sort of penal violation under the San Diego Municipal Code, for example. Instead, such communications would be deemed inappropriate and could conceivably lead to a reviewing court setting aside the council's decision. According to former San Diego City Attorney John W. Witt:

> [B]y saying a communication is inappropriate I mean that it may become the basis of a judicial determination that due process has been denied with the consequence of invalidation by a court of the action in question. That does not mean that any penalties or other legal consequences will necessarily flow from an invalidation, other than any damages, costs and attorneys fees which may be assessed because of it. What I mean is that ex parte contact is not illegal in any punitive sense, but it may have unpleasant implications when the process is judicially reviewed later.[29]

Indeed, the aggrieved party may petition the California Superior Court for a writ of mandate to vacate and remand the quasi-judicial or administrative body's decision under section 1094.5 of the California Code of Civil Procedure.[30] In such a proceeding, the reviewing court would focus on:

> [w]hether the [quasi-judicial body] has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.[31]

Should the reviewing court find a prejudicial abuse of discretion, the following procedure occurs pursuant to California Code of Civil Procedure section 1094.5(f):

> [T]he court shall enter judgment...commanding respondent to set aside the order or decision....Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law.[32]

Under some circumstances, the court may substitute its own judgment pursuant to California Code of Civil Procedure section 1094.5(e):

> Where the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (f) remanding the case to be reconsidered in the light of that evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit the evidence at the hearing on the writ without remanding the case.

A review of the California case law also shows that invalidation of a single panelist's vote may also be a remedy when ex parte communications have denied a participant a fair hearing.[33] This drastic result, however, appears to be rare. As Richard E. Archibald, Assistant City Attorney for the City of Sacramento states, "I have seen the issue raised in City land use cases two, possibly three times, and in instance has it been the basis for the reversal of a City decision."[34] Archibald further states, "To the best of my knowledge..., no decisions have been issued setting aside decisions to ex parte communication."

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VI. MEASURES TO AVOID DUE PROCESS VIOLATIONS

A court's ruling to set aside a governing board's decision, based upon a finding of denial of due process rights in connection with improper ex parte communication, could translate into significant delay for a proposed land use project, which could, in turn, generate unfavorable publicity and cost its proponents time, money, and the ability to develop future projects. Consequently, defensive measures should be taken to ensure that any ex parte contact with members of quasi-judicial bodies is permissible.

If one feels compelled to communicate ex parte with a council member, then one should discuss only general concepts and hypotheticals rather than the specifics of a particular project. Because most invalidations have resulted from unrecorded ex parte contacts, if an advocate does communicate with a council member, the advocate should add such communication to the public record before the matter is heard by the council by sending copies of the correspondence, or a written summary of the conversation, to the city clerk and to the other council members.

If an advocate feels that viewing the site, which is the subject of the quasi-judicial action, would be helpful to the advocate's case, the advocate should submit a written request for the council members to examine the site as a group, preferably accompanied by opponents of the project as well. The advocate should never invite a single council member to view the site alone when a quasi-judicial determination is pending. The key then is to follow the specific safeguards that generally require all contacts to be kept in public view so as to ensure that all opponents have the opportunity to rebut the information communicated.

VII. WIDE APPLICATION OF EX PARTE COMMUNICATION PROHIBITION

According to former San Diego City Attorney John W. Witt, ex parte rules apply to dealings with members of City Council, a council committee, or any city board or commission.[35] Similarly, "a communication which would be inappropriate if made to a council member is also inappropriate when made to one of council member's staff. That's because such a contact presumably is made to influence the council member indirectly through his or her staff member."[36]

City staff members and employees must follow the same procedures as others and must refrain from ex parte communication with council members concerning pending matters that are quasi-judicial.[37]

VIII. CONCLUSION

In sum, ex parte communications can potentially lead to a favorable decision being vacated or reversed, which in turn can lead to an irate client. However, if a lobbyist remains cognizant of the need to keep communications regarding quasi-judicial matters on the record and properly registers when lobbying on legislative matters, he will be able to avoid the embarrassment, and other potentially burdensome consequences, of having a decision overturned. It is a simple matter to comply with the "unwritten" rules on ex parte contact, and an informed advocate must know how to lobby vigorously for his client without raising the eyebrow of a reviewing judge, who will not hesitate to intervene and force the parties to follow the proper procedures if there was prejudicial error.

** Mr. Eigner is a partner at Procopio, Cory, Hargreaves & Savitch LLP and a member of the firm's Business and Technology Team. His practice emphasizes venture capital and the governing, operating, buying, selling, and merging of growing technology and other businesses. His practice further encompasses corporate and business transactions, including matters relating to telecommunications, electronic commerce, energy, biotechnology, corporate governance, employment and independent contractor issues, intellectual property protection, competitive business practices, sacristies, and business structuring and financing.*

*** Mr. Wernli is an associate at Procopio, Cory, Hargreaves & Savitch LLP and a member of the firm's Business and Technology Team. His practice focuses on general business transactions, debt and equity financing, securities law compliance, and mergers and acquisitions. He received his J.D. from the University of San Diego School of Law and his undergraduate degree from the University of California, San Diego.*

(continued on next page)

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ENDNOTES

1. San Diego City Attorney Casey Gwinn's help and encouragement were greatly appreciated.
2. Please note, however, that registration may be required under section 27.401 *et seq.* of the Municipal Code which is discussed *infra.* Opinion Letter from Assistant City Attorney Robert S. Teaze to Councilman Tom Gade (November 29, 1977).
3. Witt, "To Ex Parte or Not to Ex Parte," 34 *Dicta* vol. 7, 7 (1987).
4. Correspondence with San Diego City Attorney Casey Gwinn.
5. *San Diego Bldg. Contractors Assn' v. City Council,* 13 Cal. 3d 205, 212 (1974). Indeed, City Attorney Gwinn states, "The key is usually to look for specific government action related to a specific piece of private property." Correspondence with San Diego City Attorney Casey Gwinn.
6. *National Resources Defense Council, Inc. v. California Coastal Zone Conservation Comm'n,* 57 Cal. App. 3d 76, 83 (1976).
7. *San Diego Bldg. Contractors Assn' v. City Council,* 13 Cal. 3d 205, 212 (1974).
8. *Johnston v. City of Claremont,* 49 Cal. 2d 826, 834 (1958)l.
9. *Topanga Assn' for a Scenic Community v. County of Los Angeles,* 11 Cal. 3d 506, 5167 (1974).
10. *City of Fairfield v. Superior Court,* 14 Cal. 3d 768 (1975) (en banc).
11. *Natural Resources Defense Council, Inc. v. California Coastal Zone Conservation Comm'n,* 57 Cal. App. 3d 76 (1976).
12. *Jeffery v. City of Salinas,* 232 Cal. App. 2d 29 (1965); Safeway Stores v. City of Burlingame, 170 Cal. App. 2d 637 (1959).
13. Opinion Letter from Assistant City Attorney Robert S. Teaze to Councilman Tom Gade (November 29, 1977).
14. *See* Note, "Ex Parte Communications in Local Land Use Decisions," 15 *B.C. Envtl. Aff. L. Rev.* 181 (1987).
15. *San Diego Bldg. Contractors Assn' v. City Council,* 13 Cal. 3d 205, 212 (1974).
16. *Id.* At 208.
17. *Id.* At 217 (Emphasis added).
18. *Id.* at 207-08.
19. 313 U.S. 409 (1941).
20. *Governing Bd. Of the Alum Rock Union Elementary School Dist. V. Superior Court,* 167 Cal. App. 3d 1158, 1161 (1985); see Cal. Civ. Proc. Code § 1094.5.
21. 35 Cal. 2d 155 (1950).
22. Opinion Letter from Deputy Attorney General Richard C. Jacobs to the California Coastal Commission (September 11, 1981) (citing *English v. City of Long Beach,* 35 Cal. 2d 155 (1950)).
23. 170 Cal. App. 2d 637 (1959).
24. 14 Cal. 3d 768 (1975) (en banc).
25. *City of Fairfield v. Superior Court of Solano County,* 14 Cal. 3d 768, 780 (1975) (en banc).
26. *Id.* At 781.
27. *Id.*
28. *Governing Bd. Of the Alum Rock Elementary School Dist. V. Superior Court of Santa Clara County,* 167 Cal. App. 3d 1158, 1161-62 (1985).
29. Witt, "To Ex Parte or Not to Ex Parte," 34 *Dicta* vol. 7, 7 (1987).
30. Cal. Cv. Proc. Code § 1094.5.
31. *Id.* § 1094.5(e)
32. *Id.* § 1094.5(f)
33. *See English v. City of Long Beach,* 35 Cal. 2d 155 (1950); *Jeffery v. City of Salinas,* 232 Cal. App. 2d 29 (1965); *cf. City of Fairfield v. Superior Court of Solano County,* 14 Cal. 3d 768 (1975) (en banc).
34. Letter from Richard E. Artchibald, Assistant City Attorney dated December 26, 2002.
35. Witt, "To Ex Parte or Not to Ex Parte," 34 *Dicta* vol. 7, 7 (1987).
36. *Id.*
37. *Id.*

JOHNNIE L. PERKINS
7966 Lake Adlon Drive
San Diego, CA 92110
(619) 698-5351

December 6, 2005

Members of the San Diego Ethics Commission
City of San Diego
1010 Second Avenue, 15th Floor
San Diego, CA 92101

Dear San Diego Ethics Commissioners:

I am writing to recommend the following be given consideration when discussing Item 8: Proposed Amendments to Municipal Lobbying Ordinance.

As someone who has had the privilege of working for both elected officials and organizations with business before the City of San Diego, I believe it is time to restructure the code and regulations pertaining to lobbying our elected officials, volunteer appointees and municipal employees.

I strongly urge you to draft new language for lobbying that require anyone conducting business before any City employee, elected or appointed official to register with the City Clerk indicating such activity has occurred. I would also ask that you consider requiring elected and appointed officials who conduct business in public to disclose individuals or organizations that they have met with prior to the discussions regarding issues before those respective bodies.

The taxpayers of San Diego desire open, honest and fair representation. We owe it to them and our children to show that integrity and character are not mere words, but principles to live by.

Thank you for your consideration. May you and your families enjoy a wonderful Holiday season.

Sincerely,

JOHNNIE PERKINS

San Diego Ethics Commission
Testimony of Simon Mayeski and Alberto Zevallos
California Common Cause
November 10, 2005

Madame chair, commissioners, good evening. I am **Simon Mayeski** and **Alberto Zevallos** speaking today as a residents of San Diego, but also on behalf of Common Cause and our **4,000** members in San Diego.

We welcome this opportunity to reevaluate the municipal lobbying ordinance and to participate in a larger conversation about what reforms are needed to guarantee adequate disclosure of the various entities attempting to influence municipal decision making. This conversation could not come at a more critical time.

The questions, "who is a lobbyist?," "what does a lobbyist have to report?" and "how much should a lobbyist pay to register" are important ones. The answers to both are fundamental for holding public officials accountable to the public.

Fundamentally, lobbyist registration requirements serve to inform the public what individuals and organizations have the ear of our public officials. Our concern is that the current lobbying rules do not capture all the individuals whose jobs involve regularly communicating with city officials in order to influence city policy.

The public has a right to know what persons have regular contact with government decision makers in their attempts to influence public policy, regardless of what interests those persons represent. It cannot be left up to the whim of lobbyists to decide whether or not they should disclose their activities or the interests they represent. A clear definition of a lobbyist is needed. It should capture anyone whose job includes regular attempts to sway city officials, whether they represent developers or tenants, corporations or unions. Obviously, reasonable thresholds should weed out those individuals whose attempts to influence lawmakers are incidental and not a part of their regular duties.

The definition of state lobbyists covers those who earn a certain amount of income for lobbying or spend a certain amount of compensated time in an advocacy role.[1] We think San Diego should consider having a similar definition that has both a compensation threshold and a time threshold. San Diego may also consider adding a contact threshold, as San Francisco does, where individuals could qualify as lobbyists if they make a

[1] The California Political Reform Act defines a lobbyist as someone who is compensated at least $2,000 a month for direct communication with public officials **or** who spends 1/3 of their time in contact with public officials for the purpose of influencing legislative or administrative action.

specified number of separate contacts with City officers in any two consecutive months, for the purpose of influencing policy.[2]

In addition, it is important that lobbyists be required to disclose their contributions to political candidates and fundraising activities.[3] Equally, candidates and elected officials should be required to highlight the contributions that they receive from lobbyists. The only way to prevent unwholesome connections between governmental decisions and campaign contributions is to shine a light on lobbyist contributions.

As to the last question, "How much should a lobbyist pay to register?", we think San Diego needs to charge more than the current $40 annually and $15 per client. The Ethics Commission has a big job monitoring the lobbying and campaign practices of the second largest city on California. As such, the fee should at least cover administrative costs, and also give the Ethics Commission more resources to properly police our government.[4]

Finally, the state of California is currently discussing converting to an all online reporting system. Cities such as Los Angeles may integrate their reporting with the state to streamline the reporting and save money and time. We recommend San Diego work with the Secretary of State to investigate the feasibility of an integrated state / local online reporting system.

The members, staff and board of California Common Cause look forward to working with the Ethics Commission to address these issues.

Thank you.

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[2] San Francisco defines a lobbyist as someone who earns $3,200 or more in any consecutive three months in exchange for lobbying services **or** has at least 25 separate contacts with City officers in any two consecutive months, for the purpose of influencing local legislative or administrative action.

[3] State, Los Angeles and San Francisco lobbyists are required to disclose on their quarterly reports all contributions made in excess of $100.

[4] Lobbyists in Los Angeles pay $450 annually plus $75 per client. Lobbyists in San Francisco pay $500 annually and $75 per client.

Mel Shapiro 11-10-05

Changing lobbying ordinance-November Ethics Commission

1) When you draft a new ordinance, please consider City Attorney Opinion 90-2,which says "Ex parte contacts can influence the judgment of the decisionmaker to such an extent that an individual is deprived of a fair andimpartial hearing." There's a lot more to this opinion, which I hope you will read.
2)Study the Los Angeles lobbyist ordinance which is much stricter than ours.
3) I agree that lobbyists can not be identified by compensation alone. If a persons job includes lobbying, then he or she is a lobbyist. This includes owners.
4) Your report says that in LA fundraisers are identified. This could be in the campaign ordinance and apply to all fundraisers.
5) Please make sure that the lobbying law applies to all city agencies, boards and commisisons and includes lobbying city staff.
6) Why do we have to wait until March to discuss this subject ? You should have more frequent meetings
7) The Ethics Commission should have internal rules about being lobbied-these rules should be made public and your own contacts should be revealed.
8) About these contacts, i am troubled by having 4 lawyers on the commission since they and their law partners can be lobbied without disclosure under the attorney client privilege. This privilege should be waived.
9) We need rules about commissioners with all city agencies lobbying staff .

LE ledford enterprises

public affairs/strategic imaging for the business community

November 8, 2005

Stacey Fulhorst
Executive Director
City of San Diego Ethics Commission
1010 2nd Avenue, Suite 1530
San Diego, CA 92101

Re: Comments on Possible Amendments to Lobbying Ordinance

Dear Ms. Fulhorst:

In advance of the Commission's hearing on Thursday to accept testimony on amendments to the City's Lobbying Ordinance, I offer the following comments and recommendations.

1. **Threshold Compensation**
   I believe establishing a threshold for registration utilizing a level of compensation is an appropriate approach to addressing the larger question of influence. However, receiving ***any*** compensation for any form of advocacy should be enough to trigger registration requirements. By utilizing a "Zero Threshold" of compensation as a filter for registration, ordinary citizens who engage in the policy debate will not be affected. Another related issue the Commission may consider reviewing is the current trigger for registering as a lobbyist or registration of a new client. Currently, the $2,542 threshold must be met in any given quarter. But as a practical matter, this allows for advocacy services to be provided without disclosure for an extended period of time. Rather then using a trigger that delays registration, using the date a fee-for-services contract or agreement is signed as the threshold for requiring registration would better protect the public interest.
   RECOMMENDATION: Adopt an amendment requiring registration when any compensation is received or a fee-for-services contract for services is signed.

2. **Lobbyist Employers**
   The practice of avoiding registration by distributing workload must be addressed. Registering lobbying firms represents a good start. However, if the threshold issue is addressed as I have recommended above, it will have the same affect.
   RECOMMENDATION: Adopt the recommendation in #1 above as the first option. Require lobbying firm registration as a second option if the Commission determines that a threshold of compensation is appropriate.

3. **Registration Fees**
   As both a small business person and a registered lobbyist in the City, I am very sensitive to the cost of doing business. While added fees are never desirable, establishing a reasonable fee-for-service is appropriate. This assumes that a nexus can be established for the fee.
   RECOMMENDATION: Consider a proposal to adjust registration fees to more closely cover the cost of providing services to the professional community.

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e-mail: rledford@ledentr.com

4. **Contacts of Quarterly Disclosure Reports**
The public has a right to know the origin of any gift provided by a registered lobbyist. As an agent or intermediary, the information should be appropriately reported.
RECOMMENDATION: Adopt an amendment requiring registered lobbyists to report the origin of gifts to elected officials and staff.

5. **Fundraising Activities**
Disclosure of political contributions by registered lobbyists is appropriate. However, disclosure of campaign activities such as hosting events, walking precincts, serving on a political steering committee for a candidate and other such activities appears to me to have some Constitutional protection under freedom of expression. While the public has every right to know about monetary contributions to candidates, any regulation that goes beyond that will likely have a chilling effect on an individual's absolute right to participate in the political process.
RECOMMENDATION: Adopt an amendment requiring registered lobbyists to disclose all financial and inkind contributions to candidates for elected office.

6. **Exceptions**
This is clearly the toughest area to regulate. It is perhaps easier to suggest who should not be exempted from registration then to suggest those to be exempted. For example, registration exceptions should not be permitted for those of us in the profession (the "Zero-Threshold" for compensation that I have recommended in #1). They also should not include the non-profits that utilize membership funds or contributions, which are used in part or all to compensate for advocacy efforts on behalf of their membership. Rather, any exemptions to registration should reflect the occasional nature of that contact in addition to the individuality of it. Any action taken by the Commission on this issue should not create an obstacle to an individual citizen's engagement in the public policy development process. The Commission may want to consider a filter that separates out those acting as individuals and who are engaged in representing themselves, from those representing a larger group. While not perfect, it is a good first step in addressing this issue.
RECOMMENDATION: Adopt an amendment permitting an exemption from registration for individuals who act on their own and without compensation to influence public policy development.

I hope you find my comments and recommendations useful as the Commission deliberates on this most important issue.

Sincerely,

Richard S. Ledford